



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 550 of 2005

SAMANI CONSTRUCTION LIMITEDPLAINTIFF

VERSUS

HOME OIL LIMITEDDEFENDANT

RULING

This is an application expressed to be brought under the provisions of Order XX Rule 11 (2) Order XXI Rule 22 (1) and 91 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all the enabling provisions of the law. The application is primarily for stay of execution and for payment of balance of the judgment sum of 7,115,000.00 by installments of Kshs.350,000.00 per month w.e.f. 30.4.2007 for the next 6 months.

The applicant relies on the grounds set out in the application and the supporting affidavit of one Simon Orimba, the defendant's General Manager. The principal reasons for the application is that the defendant's business is partially grounded at the moment and it has no income from which the whole balance of the judgment sum may be paid. The applicant states that it has just completed payment of a sum of Kshs.5,739,106.00 to the same judgment creditor with the result that it now has financial difficulties which may cease after 6 months when the installments may be enhanced. The applicant fears that if the attachment is not lifted it will not operate at all leading to its collapse. In the premises the applicant prays that it be allowed to liquidate its indebtedness to the judgment creditor in the installments proposed.

The application is opposed and there is a relying affidavit sworn by one Dinesh V, Sachania, a director of the plaintiff/judgment creditor. The gist of the plaintiff's opposition is that the antecedent behaviour of the applicant/judgment debtor disentitles it to the order sought in that the plaintiff has had to resort to execution to recover the first portion of the debt of Kshs.5,739,106.00. In its view the judgment debtor has not demonstrated by documents that it indeed is in financial straits. The plaintiff further contends that it has its own creditors who are pressing for payment of their own claims which arose from the same contract that gave rise to the debt due from the judgment debtor. In the premises the plaintiff prays that the application be declined.

I have carefully considered the application, the affidavits and the submissions of counsel. Having done so, I take the following view of the matter. Under Order XX Rule 11 (2) , the court has a discretion to postpone payment of the decretal amount or order payment of the same by installments. The discretion is however not free. The applicant must show sufficient cause. In considering installments, the court will look at the circumstances in which the debt was incurred, the bonafides of the judgment debtor, the financial position of both the debtor and the judgment creditor, the conduct of the parties and the hardship that may result. Those considerations are however not exhaustive and each case is considered on its own

peculiar circumstances. In the case at hand, the judgment debtor besides stating that there are current financial constraints, has not exhibited any document to demonstrate its alleged financial difficulties. In my view, reference to previous execution in this case is not enough. Evidence of its financial status could have been furnished by documents such as its audited accounts, balance sheet, indebtedness to other creditors etc. There is therefore no basis upon which I may determine the judgment debtor's financial standing. The plaintiff on the other hand has demonstrated to my satisfaction that it is facing various suits for recovery of sums exceeding Kshs.5,000,000.00. The plaintiff states that those suits have been filed by its sub-contractors who undertook some of the works which the defendant contracted the plaintiff to do. Taking into account those circumstances, I would have rejected the judgment debtor's application in its entirety. But I have noted that the plaintiff was at some stage prepared to accept installments of Kshs.500,000.00 per month. That fact inclines me to make the following orders:-

(a) The applicant do pay balance of the decretal amount

in monthly installments of Kshs.500,000.00 with effect

from the 30.5.2007 and thereafter on the 30th of each

succeeding month until payment in full.

(b) The applicant do pay auctioneer's charges if any to be agreed or assessed by the Deputy Registrar.

(c) In default of any one installment the balance of the decretal amount to become immediately payable and the plaintiff be at liberty to execute for the same as it deems fit.

(d) The applicant to pay the costs of this application.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 11th day of May 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Bittina for the defendant and Masese holding brief for Oyatta for the plaintiff/respondent.

F. AZANGALALA

JUDGE

11/5/07